89- 1528

FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GLORIA CRUTCHFIELD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Benjamin Lipsitz,
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for Petitioner,
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Baltimore, Maryland 21208
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QUESTIONS PRESENTED

1. Whether retrial of Crutchfield in a prosecution for murder and other charges is barred by the Double Jeopardy Clause of the Fifth Amendment where the trial court first denied her renewed motion to suppress statements taken from her by police during patently custodial interrogation conducted without Miranda advices and later declared a mistrial, sua sponte and without her consent, after subsequently concluding that the some of the statements were inadmissible and should not have been disclosed to the jury.

2. Whether in those circumstances manifest necessity for a mistrial existed.

LIST OF PARTIES

The State of Maryland and Gloria Crutchfield were the only parties to this case in the Court of Appeals of Maryland (as well as in all other courts involved below).

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PETITION FOR WRIT OF CERTIORARI

Gloria Crutchfield, petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in a cause entitled State of Maryland v. Gloria Crutchfield, No. 64, September Term, 1989, in which that court reversed a judgment of the Court of Special Appeals of Maryland in Gloria Crutchfield v. State of Maryland, No. 997,

September Term, 1988, which had reversed an order of the Circuit Court for Garrett County, Maryland in State of Maryland v. Gloria Crutchfield, No. 2193, Criminal Trials, denying Crutchfield's motion to dismiss, on double jeopardy grounds, an indictment charging her with first degree murder and other crimes in connection with the death by shooting of William Richard Lawrence, her live-in boy friend, on January 17, 1987 in Carroll County, Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, filed on December 28, 1989, is reported at 318 Md. 200, 567 A.2d 449 (1989). A copy is appended hereto. Infra, App. 1.

The opinion of the Court of Special Appeals of Maryland, filed on April 3, 1989, is reported at 79 Md.App. 101, 555

A.2d 1070 (1989). A copy is appended hereto. Infra, App. 36.

The order (and opinion) of the Circuit Court for Garrett County, Maryland, denying Crutchfield's motion to dismiss the indictment against her on double jeopardy grounds, is not reported. A copy is appended hereto. Infra, App. 55.

The oral ruling (and opinion) of the Circuit Court for Garrett County, Maryland, declaring a mistrial, sua sponte, is not reported. A copy of a transcript of that proceeding is appended hereto. Infra, App. 58.

The oral ruling of the Circuit Court for Garrett County, Maryland, denying Crutchfield's renewed motion to suppress, is not reported. A copy of a transcript of that proceeding is appended hereto. Infra, App. 64.

JURISDICTION

The opinion of the Court of Appeals of Maryland (setting out the judgment sought to be reviewed) was filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(a), and Rules 12.1 and 13.1 of the Rules of this Court effective January 1, 1990.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the Constitution of the United States provides, in part pertinent hereto:

> ". . . nor shall any person be subjcet for the same offense to be twice put in jeopardy of life or limb; . . ."

(U.S.C. Const. Amend. V).

STATEMENT OF THE CASE

Crutchfield was indicted in the Circuit Court for Carroll County for first degree murder and other offenses stemming from the death of her boy friend, William

Richard Lawrence. On January 17, 1987 Maryland State Police were called to the home in Mt. Airy, Carroll County, Maryland, where she and Lawrence lived. They found Crutchfield with blood on her body and clothing. (Her blouse appeared to be cut or torn in at least one place.) Lawrence was lying on the kitchen floor. He had been shot in the head. Crutchfield handed over a gun and said she had shot him.

In response to police inquiries, Crutchfield, at the scene and without Miranda warnings, made three separate statements. Two were made to one officer, Corporal Marick. Later she made another statement, after receiving Miranda advices, to Trooper Lewis (who after his arrival took charge of the investigation.)

At a hearing in the Circuit Court for Carroll County, Maryland (Gilmore, J.) on

September 14, 1987, Crutchfield's motion to suppress those statements was denied. (The thrust of the State's contention at the suppression hearing with respect to the statements obtained without the benefit of Miranda advices was that Crutchfield was not in custody and hence Miranda warnings were not required. The State persisted in that position despite that the officers who testified at the suppression hearing acknowledged that she was not free to leave and, for example, that she was not permitted even to visit the bathroom unless accompanied by a policewoman.) The several statements in issue were similar in some respects and differed in others.

In response to an inquiry by Trooper Wehland, the first officer to arrive, Crutchfield said she shot Lawrence. She gave the trooper the gun involved.

In her first statement to Corporal Marick, taken in the kitchen of the residence, Crutchfield said in part: she and Lawrence had argued when he came home late; she had turned up the thermostat to make him angry; he hit her, pulled her hair, punched her around and threatened her with a knife; she got a small handgun (a .22 caliber derringer-type weapon) from her handbag; they struggled over the gun, which was discharged toward the ceiling; she tried to calm Lawrence down; she got possession of the gun, intending to shoot him in the arm, but, while they still were struggling over the gun, shot him in the head. In her second statement to Corporal Marick, taken in his police cruiser, Crutchfield also said in part that Lawrence first had shot at her and missed and that Lawrence had beaten her several times and she was not going to let him beat her again.

Subsequently, after receiving Miranda advices, Crutchfield made a statement to Trooper Lewis. The Court of Appeals described the content of that statement and the circumstances under which it was elicited as follows:

> "After the two statements were taken by Marick, Trooper Lewis asked Crutchfield to consent to a collection of evidence from the house. She refused. Lewis then took Crutchfield to police headquarters to obtain her clothing as evidence. During the trip, Lewis advised Crutchfield of her Miranda rights and she gave another statement, wherein she related that she and Lawrence were to go to a car show that day; that he had been away from home all day, but called the residence approximately one hour before the shooting; and that from this conversation she thought he was high and may have been using P.C.P. During their conversation, Crutchfield told Lawrence that she was not going to wait for him but was going to a party. Crutchfield admitted to Lewis that before leaving she went upstairs and took a .22 caliber revolver from a jewelry box and placed it in her purse which she then placed on the kitchen table. In response to Lewis's questions, Crutchfield said that she

took the pistol with her whenever she went out. According to her statement, Lawrence arrived at the residence before she left and the two argued. She told Lawrence that she had turned up the thermostat to 85 degrees, and that he became angry and 'went off like a wild man.' In this statement, she said that Lawrence struck her, pulled her hair and knocked her down, that her purse, which had been on the kitchen table, was knocked to the floor and the pistol came out of it; that she retrieved the gun, the two struggled over it, that it discharged into the air; and that the struggle continued. Lewis testified that in Crutchfield's statement to him, she said that '[s]he stepped back. . . . cocked the gun, [and she] described very vividly how she had to cock the pistol, and . . . when he lunged at her, she . . . fired and shot him. Lawrence fell to the floor, after which Crutchfield said she called for medical assistance.

"Crutchfield also told Lewis that at some point during the confrontation, Lawrence had what she thought was a steak knife. In response to Lewis's inquiry as to her state of mind when she shot Lawrence, Crutchfield said that she did not intend to kill him, but only to shoot him in the arm or the leg to slow him down and stop him from beating her. At that point Lewis asked Crutchfield about taking a taped statement. She asked to talk to someone before continuing. She

> later spoke to her father and thereafter declined to answer any further questions."

(App. 6-9).

The Court of Appeals described the content of Crutchfield's statements to Corporal Marick and the circumstances under which they were taken as follows:

> "Emergency medical personnel and other police officers thereafter arrived on the scene, among them Corporal Joseph Marick and Trooper Donald Lewis. Marick took two statements from Crutchfield without advising her of her Miranda rights. In the first statement, which was taken in the kitchen of the residence, Crutchfield told Marick that she and Lawrence argued because she had turned up the thermostat to anger him; and that Lawrence then pulled her hair, struck her, picked up a knife and threatened her. In this statement, Crutchfield admitted that she took a handgun from her pocketbook and that she and Lawrence struggled over the gun, which discharged toward the ceiling. Crutchfield told Marick that she then regained possession of the gun and, instead of shooting Lawrence in the arm as she intended to do, she shot him in the head. As part of this statement, Crutchfield said that when Lawrence was shot they

were still struggling over the gun. In response to Marick's inquiry as to why she had a gun in her purse, Crutchfield sad that she didn't know what kind of party she was going to and had it just in case.

"Shortly after he took this statement, Marick took Crutchfield to his police cruiser where he asked her to once again relate the details of the shooting. Crutchfield told Marick that after she told Lawrence that she had turned up the thermostat, he went to the front room and knocked things over, after which he returned to the kitchen, pulled her hair and struck her. In this statement Crutchfield said that she retrieved the gun from her pocketbook; that she struggled with Lawrence over the gun; and that Lawrence shot at her and missed. Crutchfield said that after she regained possession of the gun, she attempted to shoot Lawrence in the arm, but instead shot him in the head. Crutchfield told Marick that, at first, she thought Lawrence had feigned injury to get her affection or attention, but then she saw blood and tried to resuscitate him. She said that she called for emergency medical assistance. She also stated that Lawrence had beat her several times and that she was not going to let him beat her again."

(App. 4-6).

At the conclusion of Corporal Marick's testimony, Judge Thayer recessed

the trial, excused the jury, met with counsel in chambers and expressed concern that Crutchfield's statements to Corporal Marick had been elicited during custodial interrogation without Miranda advices, hence were inadmissible, and had improperly been disclosed to the jury. The prosecutor then gve Judge Thayer a copy of a transcript of the suppression hearing before Judge Gilmore (at which Corporal Marick had also testified), which Judge Thayer said he would examine overnight. The next morning Judge Thayer, sua sponte, declared a mistrial. In doing so (as the Court of Appeals noted) he

> ". . . indicat[ed] for the record that Crutchfield neither consented nor objected to the mistrial. He found that Corporal Marick's testimony at trial 'demonstrated that there was custodial interrogation of the defendant without prior Miranda advice' as to the statements made by Crutchfield to him in the residence and in the patrol car. Judge Thayer recognized

> from Marick's trial testimony that Judge Gilmore 'had some bad information before him.' In his sua sponte delaration of a mistrial, Judge Thayer said that the only means of permitting . . . [Crutchfield's trial] to begin again afresh' was to take this action, it being his belief that 'it now would be a travesty to proceed to a conclusion in this case.'"

(App. 10-11).

Thereafter Crutchfield moved to dismiss the indictment, contending that the trial court's sua sponte declaration of a mistrial was not manifestly necessary and that her retrial was barred by the Double Jeopardy Clause of the Fifth Amendment. On June 20, 1988 that motion was denied. Crutchfield filed an immediate appeal (as authorized by Maryland law; see Neal v. State, 272 Md. 323, 322 A.2d 887 (1874)).

The Court of Special Appeals reversed. It found that there was no manifest necessity for the mistrial. It said in part:

> "In summary, this case is one in which the trial judge, upon concluding that damaging statements which had been admitted into evidence should have been excluded, took it upon himself to declare a mistrial sua sponte in order to protect the rights of a defendant who did not seek or consent to that protection. There being nothing in the record indicating a manifest, i.e., palpable, evident, obvious, clear, plain, or patent, necessity for the trial judge to have aborted the trial, a retrial of appellant is barred by the Double Jeopardy Clause of the Fifth Amendment, which is made applicable to proceedings in State courts by the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). It was error to deny appellant's motion to dismiss the indictment."

(App. 53-54; emphasis in original).

On the State's application, the Court of Appeals granted certiorari, found that there was manifest necessity for what Judge Thayer had done, reversed the judgment of the Court of Special Appeals and directed that the case be remanded to the Circuit Court for Garrett County for retrial. It said in part:

> "In this case it was the improper admission of highly damaging evidence that prompted Judge Thayer to declare a mistrial. A brief analysis of the cases where prejudicial evidence was improperly admitted, or counsel made improper remarks or arguments, demonstrates that the case before us is well within the category of cases in which a mistrial is manifestly necessary."

(App. 22).

The Court of Appeals also noted in part that:

> "Crutchfield argues that there were alternatives to a mistrial that Judge Thayer should have considered, mainly to strike the inadmissible evidence, give a curative instruction to the jury, and afford her a choice of either accepting the instruction or the mistrial. In the circumstances of this case, we think Judge Thayer was entitled to and did exercise sound discretion in rejecting this and other alternatives now suggested by Crutchfield. . . ."

(App. 31).

It concluded by stating:

> "Judge Thayer explained his reasons for declaring the mistrial on the record. Although he did not make a specific finding of manifest

> necessity, the failure to do so does not render his declaration of the mistrial constitutionally defective. Arizona v. Washington, supra, 434 U.S. at 517. From our review of the record, it is evident that Judge Thayer did not err in declaring the mistrial in this case. In our view, Judge Thayer proceeded in accordance with the formulation given in United States v. Perez, 22 U.S. at 580, nmely, in evaluating the manifest need for the mistrial, he proceeded with 'the greatest caution, under urgent circumstances, and for very plain and obvious causes."

(App. 34-35).

The federal question sought to be reviewed, viz. Crutchfield's entitlement vel non in the circumstances of this case to be free under the Double Jeopardy Clause of the Fifth Amendment from being twice put in jeopardy for the same alleged offense, thus was raised in the trial court, following that court's sua sponte declaration of a mistrial without her consent, by her motion to dismiss (filed in the Circuit Court for Garrett County on

April 6, 1988). That motion was denied on the basis that retrial was not barred by the federal constitutional prohibition against double jeopardy. (Order, June 30, 1988, Circuit Court for Garrett County [Thayer, C.J.]; App. 55-56). Crutchfield raised and argued the question, including the issue whether Judge Thayer's action was required by manifest necessity, again in her respective briefs and oral arguments in the appellate courts of Maryland, one of which, the Court of Special Appeals, held that double jeopardy principles prohibited her retrial, because there had been no manifest necessity for the mistrial. (Opinion in No. 997, September Term, 1988, Court of Special Appeal of Maryland; App. 36-54). The highest Maryland court, the Court of Appeals, disagreed. It held that Judge Thayer's action was manifestly necessary

and did not contravene double jeopardy protections. It ordered retrial. (Opinion in No. 64, September Term, 1989, Court of Appeals of Maryland; App. 1-35). Crutchfield now petitions this Court to review that final state court disposition of the important federal constitutional question here presented.

REASONS FOR ALLOWING THE WRIT

The Court of Appeals of Maryland, supporting its decision on the premise that its action accorded with pertinent dictates of this Court, decided an important federal issue relating to application of the protection against double jeopardy afforded by the Fifth Amendment to the Constitution of the United States and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d

707 (1969). The parameters of the area in which the court thus acted have long been fixed and controlled by federal law, principally by decisions of this Court. See, for example, United States v. Perez, 22 U.S. (Wheat.) 579, 6 L.Ed. 165 (1824); Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978); Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 342 (1984). The specific issue involved in the instant case was as to the existence vel non of manifest necessity for the action of the Maryland trial court in declaring sua sponte a mistrial in a first degree murder case without the request or consent of the defendant, Crutchfield. The Court of Appeals, interpreting and applying decisions of this Court, found that the

requisite manifest necessity for a mistrial was present and hence directed a retrial. (The Court of Special Appeals of Maryland, that State's intermediate appellate court, had earlier considered the same facts and applied the same law [essentially the same decisions of this Court], but found the manifest necessity required to permit retrial to be lacking. The differing outcomes in the two Maryland appellate courts appear to be attributable to their dissimilar interpretation and application of pronouncements of this Court.) Crutchfield suggests that the Court of Appeals thus decided a question of federal law, particularly in regard to the concept of "manifest necessity" in the mistrial/retrial context, in a way that may not comport with at least some aspects of applicable decisions of this Court as to appropriate application of the Double

Jeopardy Clause. She respectfully suggests that the question involved is important and pervasive enough to warrant this Court's attention. She recognizes that this Court has declined to formulate any bright line rules for determining presence or absence of manifest necessity in relation to double jeopardy, see, for example, United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), but suggests that the instant case is an example of such a broad interpretation and application of that concept that, unless the scope of its formulation of "manifest necessity" is substantially limited that appellation will became a mere catch phrase and very few, if any, situations will be found with room for a contention that such necessity is not present.

In this case Crutchfield did nothing to bring about either the mistrial or to

produce the underlying circumstances which brought it about. At the suppression hearing the State persisted in pursuing a patently fanciful theory that the two objectionable statements, admission of which triggered Judge Thayer's reaction, were obtained when Crutchfield was not in custody. If anyone ever was in custody, it was Crutchfield when she was interrogated by Corporal Marick. As much was apparent from the testimony of the officers at the suppression hearing. Not only was she deprived of her freedom of movement from the moment the first trooper arrived on the scene, but she was not even allowed to go to the bathroom alone. When it was necessary that she take her dogs to a neighbor for safekeeping, she was permitted to do so only in the company of a policeman. Yet the State strenuously contended that she was not in custody when

interrogated by Corporal Marick and succeeded in persuading the suppression hearing judge to that effect. The State continued to assert that position by producing at trial the same officers who testified at the suppression hearing, to offer to the jury the same statements on the same basis, only to have the situation blow up in its face when Corporal Marick sought to change his testimony about whether Crutchfield had or had not been given Miranda warnings before he questioned her and Judge Thayer recognized the obvious, that the statements taken by Corporal Marick were indeed obtained during patently custodial interrogation, in complete and utter disregard of this Court's pronouncements in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and should not have

been admitted. Only after Judge Thayer had made his thoughts in that regard painfully apparent to the prosecutor did the State, as Judge Thayer remarked in his order of June 20, 1988 (App. 56) denying Crutchfield's motion to dismiss, concede that the statements elicited by Corporal Marick were inadmissible. And two courts, on separate occasions, Judge Gilmore at the suppression hearing and Judge Thayer at trial when he denied Crutchfield's renewed motion to suppress (when he made that ruling he had not yet either heard the testimony of Corporal Marick or examined a transcript of the suppression hearing) suported the State and thus permitted erroneous presentation of improper evidence to the jury. Without any inappropriate or untoward conduct on her part, without her consent, and solely on the basis of the State's mistake in

offering inadmissible evidence and the trial court's error in admitting it, Crutchfield, having been brought to trial and placed in jeopardy on a charge of murder, was deprived of her valued right to continue to a verdict with that tribunal solely because of actions and opinions of others.

This Court in United States v. Jorn, supra, 400 U.S. at 484, spoke of a defendant's "valued right to have his trial completed by a particular tribunal" and said in part:

> "If that right to go to a particular tribunal is valued, it is because independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a delaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by defendant for mistrial is ordinarily assumed to remove any barrier to

> reprosecution, even if the defendnat's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

(400 U.S. at 485 [footnotes omitted]).

In the instant case the trial court's inquiry prior to deciding that manifest necessity existed, entitling him to abort Crutchfield's trial and dispose of her valued right to go to verdict with the particular tribunal before which she had been placed in jeopardy, extended to no more than conferences with counsel, examination of the suppression hearing transcript (which apparently only served to confirm his opinion that the statements taken by Corporal Marick were the products of custodial interrogation) and examination of the law. No juror was

subjected to voir dire examination in an effort to determine the effect on the jury of admission of the improperly obtained statements. No proposed curative instruction was drafted.

Had the trial been permitted to continue, the error which arose when the statements were admitted as part of the State's case might well have been alleviated since, had Crutchfield testified, as she might well have been obliged to do in order to establish a defense of self-defense, any inconsistent statements, if any, which the prosecutor might think she made to Corporal Marick might well have been elicited from her on cross examination. Nor was continuation of the trial, even with the jury being aware of the inadmissible statements, necessarily fatal to Crutchfield's case.

In fact, she may have been able to use discrepancies developed between his suppression hearing testimony and the evidence he gave at trial as a basis for discrediting not only his but other police versions of what she allegedly said and hence of the State's submission as to what occurred between her and Lawrence. Moreover, most of what was contained in Corporal Marick's version of Crutchfield's statements to him was part also of her statement to Trooper Lewis, given after Miranda advices and hence not to be excluded for the defect which rendered the earlier statements improper. Thus the trial court's conclusion, upheld by the Court of Appeals, that the content of the two statements to Corporal Marick was so harmful as to establish manifest necessity for a mistrial is not well founded. Essentially the same information would

have come in from Trooper Lewis anyhow.

Nor would dismissal of the indictment against Crutchfield defeat the ends of public justice. Rather, ehe submits, application of double jeopardy constraints to her situation would advance those ends. As she has endeavored to point out already, the activities which injected the double jeopardy issue into this case were not of her making. The State, in pushing as it did the contention that Crutchfield's statements to Corporal Marick were admissible, despite clear and convincing evidence to the contrary, must have appreciated that it was engaged in an exercise which inevitably would lead to exactly what resulted when Corporal Marick changed his testimony and the mistrial occurred. The ends of public justice are far better served by vindication of a major constitutional right, such as the

prohibition against double jeopardy, than it is by retrial of any defendant, however severe the charge involved. An example and reminder to police, prosecutors (and perhaps even courts) that consitutional entitlements are not to be lightly infringed is of inestimable importance and value to public justice. Disregard of constituional principle should be dealt with appropriately, in this case by application of double jeopardy principles to prevent retrial. As this Court stated, in part, in Arizona v. Washington, supra, 434 U..S. at 506, with respect to the manifest necessity concept, "we assume that there are degrees of necessity and we reuire a 'high degree' before concluding that a mistrial is appropriate." Crutchfield urges that the requisite high degree of necessity for the sua sponte mistrial, without her consent, did not

arise from the circumstances of this case and that this Court should review the decision of the Court of Appeals of Maryland to determine if that court erred in the important constitutional area in issue and to correct any error it may find.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari shoul be granted.

Respectfully submitted,

Benjamin Lipsitz,
Counsel of Record
for Petitioner

Baltimore, Maryland

March 28, 1990

APPENDIX

App. 1

IN THE COURT OF APPEALS OF MARYLAND

No. 64

September Term, 1989

STATE OF MARYLAND

v.

GLORIA CRUTCHFIELD

Murphy, C.J.,
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Orth, Charles E., Jr.
(retired, specially
assigned),

JJ.

Opinion by Murphy, C.J.

Filed: December 28, 1989

This case involves the sua sponte declaration of a mistrial by a trial judge in a criminal case and whether, in the circumstances, retrial of the defendant would violate the double jeopardy clause of the Fifth Amendment to the Federal Constitution, now applicable to the States through the Fourteenth Amendment under Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). /1

I.

On January 17, 1987, the Maryland State Police responded to a call regarding a shooting at a home in Mt. Airy, Maryland. Trooper Douglas Wehland, the first to arrive at the scene, discovered Gloria Elizabeth Crutchfield on the porch

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/1 The Fifth Amendment provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

of the residence; she implored Wehland to come to the shooting victim's aid. Crutchfield had blood on her skin and clothing. In response to Wehland's inquiry, she stated she had shot a man, later identified as William Richard Lawrence. The victim ws lying on the floor, bleeding. At no time during this period did Wehland advise Crutchfield of her rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 16Ø2, 16 L.Ed.2d 694 (1966).

Emergency medical personnel and other police officers thereafter arrived on the scene, among them Corporal Joseph Marick and Trooper Donald Lewis. Marick took two statements from Crutchfield without advising her of her Miranda rights. In the first statement, which was taken in the kitchen of the residence, Crutchfield told Marick that she and Lawrence argued

because he had arrived home late; that she turned up the thermostat to anger him; and that LAwrence then pulled her hair, struck her, picked up a knife and threatened her. In this statement, Crutchfield admitted that she took a handgun from her pocketbook, and that she and Lawrence struggled over the gun, which discharged toward the ceiling. Crutchfield told Marick that she then regained possession of the gun and, instead of shooting Lawrence in the arm as she intended to do, she shot him in the head. As part of this statement, Crutchfield said that when Lawrence was shot they were still struggling over the gun. In response to Marick's inquiry as to why she had a gun in her purse, Crutchfield said that she didn't know what kind of party she was going to and had it just in case.

Shortly after he took this statement, Marick took Crutchfield to his police cruiser where he asked her to once again relate the details of the shooting. Crutchfield told Marick that after she told Lawrence that she had turned up the thermostat, he went to the front room and knocked things over, after which he returned to the kitchen, pulled her hair and struck her. In this statement, Crutchfield said that she retreived the gun from her pocketbook; that she struggled with Lawrence over the gun; and that Lawrence shot at her and missed Crutchfield said that after she regained possession of the gun, she attempted to shoot Lawrence in the arm, but instead shot him in the head. Crutchfield told Marick that, at first, she thought Lawrence had feigned injury to get her attention or affection, but then she saw

blood and tried to resuscitate him. She said that she called for emergency medical assistance. She also stated that Lawrence had beat her several times and that she was not going to let him beat her again.

After the two statements were taken by Marick, Trooper Lewis asked Crutchfield to consent to a collection of evidence from the house. She refused. Lewis then took Crutchfield to police headquarters to obtain her clothing as evidence. During the trip, Lewis advised Crutchfield of her Miranda rights and she gave another statement, wherein she related that she and Lawrence were to go to a car show that day; that he had been away from home all day, but called the residence approximately one hour before the shooting; and that from this conversation she thought he was high and may have been using P.C.P. During this conversation,

Crutchfield told Lawrence that she was not going to wait for him but was going to a party. Crutchfield admitted to Lewis that before leaving, she went upstairs and took a .22 caliber revolver from a jewelry box and placed it in her purse, which she then placed on the kitchen table. In response to Lewis's questions, Crutchfield said that she took the pistol with her whenever she went out. According to her statement, Lawrence arrived at the residence before she left and the two argued. She told Lawrence that she had turned up the thermostat to 85 degrees, and that he became angry and "went off like a wild man." In this statement, she said that Lawrence struck her, pulled her hair and knocked her down; that her purse, which had been on the kitchen table, was knocked to the floor and the pistol came out of it; that she retrieved the gun, the two

struggled over it, that it discharged into the air; and that the struggle continued. Lewis testified that in Crutchfield's statement to him, she said that "[s]he stepped back, ... cocked the gun, [and she] described very vividly how she had to cock the pistol, and . . . when he lunged at her, she . . . fired and shot him." Lawrence fell to the floor, after which Crutchfield said she called for medical assistance.

Crutchfield also told Lewis that at some point during the confrontation, Lawrence had what she thought was a steak knife. In response to Lewis's inquiry as to her state of mind when she shot Lawrence, Crutchfield said that she did not intend to kill him, but omly to shoot him in the arm or leg to slow him down and stop him from beating her. At that point Lewis asked Crutchfield about taking a

taped statement. She asked to talk to someone before continuing. She later spoke to her father and thereafter declined to answer any further questions.

Crutchfield was subsequently indicted in the Circuit Court for Carroll County for first degree murder, second degree murder, manslaughter and use of a handgun in the commission of a felony. At a suppression hearing held on September 14, 1987, the court (Gilmore, J.) denied Crutchfield's motion to suppress her statements.

The case was removed to the Circuit Court for Garrett County where a jury trial began on February 19, 1988 before Chief Judge Frederick A. Thayer, III. Crutchfield again moved to suppress the statements she had made to the officers. In reliance on Judge Gilmore's denial of the motion at the earlier suppression

hearing, Judge Thayer also denied the motion.

Upon the conclusion of Marick's testimony at the trial, the jury was excused and the trial was recessed. Judge Thayer called counsel into chambers and expressed concern that Crutchfield's statements to Marick had been improperly admitted in evidence. That evening Judge Thayer reviewed the transcript of the suppression hearing before Judge Gilmore, as well as the law governing the admissibility of statements given during custodial interrogation by police. The following morning Judge Thayer declared a mistrial, indicating for the record that Crutchfield neither consented nor objected to the mistrial. He found that Corporal Marick's testimony at trial "demonstrated that there was custodial interrogation of the defendant without prior Miranda

advice" as to the statements made by Crutchfield to him in the residence and in the patrol car. Judge Thayer recognized from Marick's trial testimony that Judge Gilmore "had some bad information before him." In his sua sponte declaration of a mistrial, Judge Thayer said that the "only means of permitting . . . [Crutchfield's trial] to begin again afresh" was to take this action, it being his belief that "it now would be a travesty to proceed to a conclusion in this case."

Cruthfield later moved to dismiss the indictment, claiming that the sua sponte declaration of the mistrial was not based on manifest necessity and violated the double jeopardy provision of the Constitution. Judge Thayer denied the motion.

Crutchfield filed an immediate appeal from Judge Thayer's order, as authorized

by Neal v. State, 272 Md. 323, 322 A.2d 887 (1974). The Court of Special Appeals reversed, holding that Crutchfield's retrial was barred by double jeopardy principles because the mistrial was not based upon manifest necessity and Crutchfield did not consent to it. In so holding, the intermediate appellate court first recognized that the trial judge expressed "his belief that the damage done to [Crutchfield's] case by the admission of highly prejudicial evidence that should have been excluded was irreparable." Crutchfield v. State, 79 Md.App. 101, 103, 555 A.2d 1070 (1989). It noted that the two statements made to Marick were "extremely damaging to [Crutchfield] because they were inconsistent with her other statements and her self-defense theory of defense [and] had been made in response to interrogation while . . . in

custody and before she had been advised of her Miranda rights." Id. It further said that where a mistrial has been declared sua sponte by the trial judge without the defendant's explicit acquiescence, "retrial will not be barred if there was a manifest necessity for the mistrial; however, if the trial was needlessly aborted, retrial will be barred." Id. at 105. As to this, the court concluded that while "a great deal of deference must be given the trial judge's determination; . . . great deference should be given [to the defendant's] determination as to whether his own interests would be better served by aborting the trial or by submitting his fate to the jury that is already impanelled." Id. at 107. The court held that "except in the most extraordinary circumstances, that decision should be left to the defendant, not the judge." Id.

The intermediate appellate court recognized that "the error was the admission of evidence, prejudicial to the defendant, that should have been excluded." Id. at 108. In this regard, it said that there is a presumption that a jury can and will follow curative instructions when they are given. At the same time, the court also recognized that "it would be reversible error to admit into evidence an involuntary confession . . . . with the expectation that a curative instruction will negate the harm." Id. at 109. Nevetheless, the court reasoned that the trial judge "may not decide as a matter of law, over the defendant's objection or without his consent, that the harm is incurable." Id. It explained:

> "The defendant may believe that no substantial harm has been done; he may believe that a curative

> instruction would alleviate the harm; or he may believe that continuing the case before the jury already impanelled, if that jury is properly instructed, is a benefit that would outweigh any residual harm. If the defendant declines to move for a mistrial, choosing to continue the acse before the impanelled jury, to which a curative instruction has been given, the error in admitting the evidence will not necessitate a reversal; it will be deemed to be either cured or waived." Id.

The court consluded its opinion with these words:

> "[T]his case is one in which the trial judge, upon concluding that damaging statements which had been admitted into evidence should have been excluded, took it upon himself to declare a mistrial sua sponte in order to protect the rights of a defendant who did not seek or consent to that protection. There being nothing in the record indicating a manifest, i.e.. palpable, evident, obvious, clear, plain or patent, necessity for the trial judge to have aborted the trial, a retrial of appellant is barred by the Double Jeopardy Clause of the Fifth Amendment . . . ." Id. at 109-10 (emphasis in original).

We granted certiorari upon the State's petition to determine whether the

Court of Special Appeals erred in reversing Judge Thayer's denial of Crutchfield's motion to dismiss the indictment.

II

Judge Eldridge, writing for the Court in Cornish v. State, 272 Md. 312, 322 A.2d 880 (1974), reviewed relevant Supreme Court cases governing the application of the Fifth Amendment's double jeopardy clause to a retrial following the declaration of a mistrial. United States v. Perez, 22 U.S. (Wheat.) 579, 6 L.Ed. 165 (1824), the seminal Supreme Court decision in this regard, explained at 580:

> "[I]n all cases of this nature, the law has invested Courts of justice with the auhtority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, They are to exercise a sound discretion on the subject; and

> it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . [Courts] have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." (Emphasis supplied.)

See also Richardson v. United States, 468 U.S. 317, 323-34, 104 S.Ct. 3081, 82 L.Ed.2d 342 (1984); Oregon v. Kennedy, 456 U.S. 667, 672,102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); Arizona v. Washington, 434 U.S. 497, 505-06, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978); Illinois v. Somerville, 410 U.S. 458, 461-62, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); Cornish v. State, 272 Md. at 316-17. In Arizona v. Washington, supra, 434 U.S. at 506, the Supreme Court said that the

> "classic formulation of the [manifest necessity] test has been

> quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not descibe a standard test that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate."

The Supreme Court has not fashioned any hard and fast rules for determining when manifest necessity exists; rather, it has "explicitly declined the invitations of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." United States v. Jorn, supra, 460 U.S. at 480. Additionally, the manifest necessity standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the

varying and often unique situations arising during the course of a criminal trial." Illinois v. Somerville, supra, 410 U.S. at 462.

We recognized in Cornish, 272 Md. t 318, that the Supreme Court has established broad principles to be followed in determining whether there was manifest necessity for a mistrial. See also Jourdan v. State, 275 Md. 495, 510, 341 A.2d 388 (1975). At one extreme are the mistrials that are not based upon manifest necessity and have been declared to give prosecutors an unfair advantage over the defendant. Arizona v. Washington, supra, 434 U.S. at 507-08; In Re Mark R., 294 Md. 244, 250-51, 449 A.2d 393 (1982). At the other extreme is the hung jury, considered to be the classic example of what constitutes manifest necessity for a

mistrial. See Arizona v. Washington, supra, 434 U.S. at 509; In Re Mark R., 294 Md. at 250-51; see also, e.g., Keerl v. Montana, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734 (1909); Drever v. Illinois, 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79 (1902); Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892); United States v. Perez, supra, 22 U.S. (Wheat.) 579.

There is a wealth of case law that has fleshed out the spectrum between these two extremes. Manifest necessity exists where there has been a procedural error in the proceedings which would necessitate a reversal on appeal. Illinois v. Somerville, supra, 410 U.S. at 464. The Supreme Court has also found manifest necessity for a mistrial where a juror has possibly been biased or the juror's impartiality is questionable. Thompson v.

United States, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894) (one of the trial jurors served on the grand jury that indicted the defendant); Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891) (possible juror bias as a result of a newspaper article about a letter written by defense counsel which denied that one of the jurors was acquainted with the defendant). Manifest necessity does not exist where a prosecution witness is absent or where the mistrial is declared "so as to afford the prosecution a more favorable opportunity to convict . . . ." Downum v. United States, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). In Jourdan v. State, supra, we held that there was no manifest necessity for a sua sponte declaration of a mistrial where the prosecuting attorney became ill during the

trial and a short continuance until another prosecutor could become prepared was a feasible alternative. Nor does the manifest necessity for a mistrial exist where the State's witness could not communicate in the English language and a short contiuance to obtain an interpreter would have solved the problem. /2 In Re Mark R., supra.

In this case, it was the improper admission of highly damaging evidence that prompted Judge Thayer to declare a mistrial. A brief analysis of the cases where prejudicial evidence was improperly admitted, or counsel made improper remarks or arguments, demonstrates that the case before us is well within the category of cases in which a mistrial is manifestly necessary.

/2 For cases relating the history of the manifest necessity standard, see Cornish, supra, 272 Md. at 316-20.

In Arizona v. Washington, supra, defense counsel made improper remarks in his opening statement to the jury regarding evidence that the prosecutor withheld from the defendant. The Supreme Court began its analysis "from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury." 434 U.S. at 511 (emphasis supplied). It "recognize[d] that the extent of possible bias cannot be measured," and that it was entirely possible "that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions." Id. Continuing, the Court said that

> "[i] a strict, literal sense, the mistrial was not 'necessary. 'Nevertheless, the overriding interest in the evenhanded administration of justice requires thatwe accord the highest degree of respect to the trial

> judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." Id.

In the instant case, the improperly admitted statements likely had a more severe impact upon the jury than the improper comment made to the jury in Arizona v. Washington. Here, as in that case, the "highest degree of respect" must be given to Judge Thayer's evaluation of the effect of the improperly admitted statements upon the jury.

In Cornish, we held that manifest necessity for a mistrial existed where the prosecutor made a prejudicial remark during a nonjury murder trial (which the judge concluded would be very difficult for her to disregard) and the trial judge concluded that a continuance would not be practical.

In Neal v. State, supra, we affirmed the cirucit court's denial of a motion to

dismiss a warrant charging defendant with shoplifting. There, a mistrial was declared because articles allegedly stolen by the defendant, which were suppressed as fruits of a warrantless search, were within sight of the jury for the entire trial and were repeatedly referred to throughout the trial.

Courts in other states have found manifest necessity for sua sponte mistrials in similar cases. The Supreme Court of Delaware, in Bailey v. State, 521 A.2d 1069 (Del. 1987), found manifest necessity to exist in a trial judge's sua sponte declaration of a mistrial where prosecution witnesses referred to the defendant's prior trial on the same charges and a third prosecution witness referred to the prior trial and the resulting conviction. In an earlier case, Rentoul v. State, 301 A.2d 284 (Del.

1973), the court also found manifest necessity for a mistrial where the prosecutor and defense counsel made improper remarks in their opening statements. The trial judge, sua sponte, declared a mistrial after the prosecutor stated that a blood alcohol test could not be introduced because it was defective as the result of an insufficient breath sample, and defense counsel alleged that exculpatory evidence was being suppressed by the state.

In Abdi v. State, 249 Ga. 827, 294 S.E.2d 506 (1982), the court found manifest necessity for a mistrial in a rape case when defense counsel questioned the complaining witness regarding her sexual experience. The prosecutor objected to the question under the Georgia "shield law" and moved that defense counsel be rebuked, at which time the

trial judge, sua sponte, declared a mistrial without objection from the defendant.

Manifest necessity for a mistrial was found by the court in State v. Brady, 120 N.H. 899, 424 A.2d 407 (1980). In that case the trial judge declared a sua sponte mistrial after finding one of the defendants in contempt of court for stating "that the trial was 'reminiscent of a kangaroo court.'" Id. at 408-09. The appellate court thought the trial judge's discretion was properly exercised because the defendant's "obvious hostility to the judge's rulings could not help but influence the jury." Id. at 409.

In State v. Blanks, 190 N.J. Super. 269, 463 A.2d 359 (1983), the court held that the trial judge had correctly declared a mistrial based on manifest necessity where a witness who allegedly

participated in the crime with the defendant stated that he had been found not guilty in a prior separate trial. There, the trial judge concluded that a curative instruction would be insufficient.

Courts that have not found manifest necessity for sua sponte mistrials have had very different facts before them. In People v. Benton, 402 Mich. 47, 260 N.W.2d 77 (1977), the court held that there was no manifest necessity for the declaration of a mistrial where the prosecutor improperly impeached his own witness who allegedly was an accomplice pf the defendant in an armed robbery. In Klinefelter v. Superior Court, County of Maricopa, 108 Ariz. 494, 502 P.2d 531 (1972), the court held that there was no manifest necessity for the declaration of a mistrial in an aggravated battery case

because a rebuttal witness twice referred to information which had been excluded as improper rebuttal testimony. In Espinoza v. District Court In & For County of Conejos, 180 Colo. 391, 506 P.2d 131 (1973), the court held that there was no manifest necessity for a sua sponte mistrial over the prosecutor's objection where the defendant's attorney's cross-examination of an alleged rape victim and closing argument before a jury, were "either completely proper or involved at most only minor improprieties." Id. at 134. In District of Columbia v. I.P., 335 A.2d 224 (D.C. 1975), the court found no manifest necessity for a sua sponte mistrial where the trial judge recused himself because he believed that the prosecutor was attempting to withhold evidence.

In Jones v. State, 17 Md.App. 504, 302 A.2d 638 (1973), the court found no manifest necessity for the declaration of a mistrial merely because the trial judge believed he had incorrectly admitted evidence that an armed robbery suspect's victim was a drug dealer.

III.

We held in Cornish, 272 Md. at 320, that "a retrial is barred by the Fifth Amendment where reasonable alternatives to a mistrial, such as a continuance, are feasible and could cure the problem." We also stated in Neal v. State, supra, 272 Md. at 326, that "[t]he trial judge's function is to see that the defendant has a fair trial. Once he perceives that the trial cannot proceed because of prejudice to the defendant, he has no choice but to declare a mistrial."

Crutchfield argues that there were alternatives to a mistrial that Judge Thayer should have considered, mainly to strike the inadmissible evidence, give a curative instruction to the jury, and afford her the choice of either accepting the instruction or the mistrial. In the circumstances of this case, we think Judge Thayer was entitled to and did exercise sound discretion in rejecting this and other alternatives now suggested by Crutchfield. As the Supreme Court said in Illinois v. Somerville, supra, 410 U.S. at 464:

> "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before

> the jury, it would automatically be stripped of that success by an appellate court. This was substantially the situation in both Thompson v. United States, [155 U.S. 271, 155 S.Ct. 73, 39 L.Ed. 146 (1894)] and Lovato v. New Mexico, [242 U.S. 199, 37 S.Ct. 107, 61 L.Ed. 244 (1916)]."

As earlier indicated, the Court of Special Appeals recognized that it would be reversible error to admit Crutchfield's statements to Marick into evidence with the expectation that a curative instruction would negate the harm. 79 Md.App. at 109. It nevertheless concluded, against the relevant case authority, that it was for the defendant, and not the trial judge, to make the ultimate determination of manifest necessity for a mistrial, including whether a curative instruction would alleviate the harm done by the improperly admitted evidence of Crutchfield's guilt. In so holding, the court in effect

rendered the trial judge a useless appendage in the judgmental process of determining whether a mistrial was manifestly necessary in the interest of public justice. That Crutchfield may have been receptive to a curative instruction and thereby would possibly waive the evidentiary error on appeal if she was convicted, does not circumscribe the traditional power vested in the trial judge to declare, sua sponte, whether a mistrial must be granted on the basis of manifest necessity. And this is so without regard to the defendant's acquiescence or objection. In other words, the public interest is not served by rendering a trial judge powerless to act where a defendant, knowing that reversible error had been committed during the trial, does not consent to the mistrial, being secure in the belief that

if the jury returns a verdict of guilty, the conviction will in any event be reversed on appeal. To permit such a result would fly in the face of Illinois v. Somerville, supra and would not accord "the highest degree of respect" to the trial judge's evaluation of the manifest need for a mistrial, as required by Arizona v. Washington, 434 U.S. at 511. As the latter case states, 434 U.S. at 512-13:

> "The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial as he did in United States v. Dinitz, 424 U.S. 600 [96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)]. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases."

Judge Thayer explained his reasons for declaring the mistrial on the record. Although he did not make a specific

finding of manifest necessity, the failure to do so does not render his declaration of the mistrial constitutionally defective. Arizona v. Washington, supra, 434 U.S. at 517. From our review of the record, it is evident that Judge Thayer did not err in declaring the mistrial in this case. In our view, Judge Thayer proceeded in accordance with the formulation given in United States v. Perez, supra, 22 U.S. at 580, namely, in evaluating the manifest need for the mistrial, he proceeded with "the greatest caution, under urgent circumstances, and for very plain and obvious causes."

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR GARRETT COUNTY FOR REINSTATEMENT OF THE INDICTMENT AND FOR TRIAL CONSISTENT WITH THE VIEWS EXPRESSED IN THIS OPINION. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY APPELLEE.

App. 36

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 997

September Term, 1988

GLORIA CRUTCHFIELD

v.

STATE OF MARYLAND

Bishop,
Bloom,
Bell, Robert M.,

JJ.

OPINION BY BLOOM, J.

Filed: April 3, 1989

Gloria Crutchfield appeals from an order of the Circuit Court for Garrett County denying her motion to dismiss, on double jeopardy grounds, an indictment charging her with murder and other offenses.

The indictment against appellant was originally filed in the Circuit Court for Carroll County. Appellant moved in that court for an order suppressing certain statements she had made to various police officers, asserting that those statements were made in response to custodial interroagtions conducted before she was advised of her Miranda rights. After an evidentiary hearing, the suppression motion was denied, the hearing judge having concluded that appellant either had received a Miranda warning or was not in custody when she made each of the statements that were the subject of her motion.

At appellant's request, the case was removed to Garrett County for trial. After the trial had commenced but before any of the police officers testified, appellant renewed her motion to suppress, but the trial judge, relying on the decision of the motions hearing judge, denied the renewed suppression motion. The officers testified, and the substance of four oral statements made by appellant at the scene of the homicide were admitted in evidence. It was only after all four of those statements had been related to the jury that it became apparent to the trial judge that two of those statements - extremely damaging to appellant because they were inconsistent with her other statements and her self-defense theory of defense - had been made in response to interrogation while appellant was in custody and before she ahd been advised of

her Miranda rights. The trial came to an abrupt halt, and the judge and counsel adjourned to the judge's chambers for a discussion as to how to deal with the problem.

No record was made of the proceedings in chambers, but we can deduce certain facts from what was put on the record later. The trial judge immediately expressed his belief that the damage done to appellant's case by the admission of highly prejudicial evidence that should have been excluded was irreparable. He suggested that defense counsel move for a mistrial. Counsel admnittedly voiced no disagreement with the judge's assessment, but he refused to move for or consent to a mistrial, indicating that he fully intended to preserve appellant's right to move for dismissal of the indictment if the court declared a mistrial without

appellant's consent. Nevertheless, the trial judge, on his own motion, declared a mistrial. We do not know if any alternative to a mistrial was considred or discussed; we do know, from the trial judge's comments on the record, that appellant neither objected to nor consented to the court's sua sponte mistrial declaration.

Having already been put in jeopardy by the commencement of the aborted trial, appellant moved for dismissal of the indictment on the ground that to try her again would put her twice in jeopardy for the same offense. That motion was denied, and this appeal was promptly noted to raise a single issue:

> Whether, having declared a mistrial, without appellant's consent, because statements made by appellant during custodial interrogation conducted without Miranda warnings had been admitted in evidence, the trial court erred

in denying appellant's motion to dismiss on double jeopardy grounds.

We believe the trial court did err in denying the motion to dismiss the indictment. That error, of course, is what brings the matter to our attention. It was the earlier error, however, the declaration of a mistrial without the defendant's consent, that made it constitutionally impossible to retry her.

As Judge Moylan, writing for this Court in West v. State, 52 Md.App. 624 (1982), pointed out, there are four distinct categories of double jeopardy preently recognized for purposes of federal constitutional law:

1. "Classic" former jeopardy, arising out of the common law pleas in bar of autrefois convict and autrefois acquit.

2. Simultaneous double jeopardy, primarily involving issues of merger and multiple punishment.

3. Collateral estoppel.

4. The mistrial/retrial problem, which became firmly established as an aspect of double jeopardy constitutional law in Wade v. Hunter, 336 U.S. 684 (1949).

There are, in turn, two distinct subspecies of mistrial/retrial double jeopardy situations. One, which does no concern us here, is where the mistrial is declared at the request of the defendant. Ordinarily, a defendant's request for a mistrial is deemed to be a waiver of any double jeopardy claim, the only exception being if the defense request had been prompted by prosecutorial or judicial overreaching. West, 52 Md.App. at 631.

The second subspecies, the variety that does concern us in this case, is where the mistrial has been declared by the judge sua sponte or at the request of the State without the defendant's explicit acquiescence. In those situations, retrial will not be barred if there was a

manifest necessity for the mistrial; however, if the trial was needlessly aborted, retrial will be barred. West, 52 Md.App. at 630-31, citing United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Arizona v. Washington, 434 U.S. 497 (1978); and Illinois v. Somerville, 410 U.S. 458 (1973).

The rule, which is easy to recite, is difficult to apply, because, as the Court of Appeals observed in Cornish v. State, 272 Md. 312 (1974), the Supreme Court has not attempted to enumerate those instances when manifest necessity exists. It obviously exists when a jury is unable to agree upon a verdict. United States v. Perez, supra; Logan v. United States, 144 U.S. 263 (1892).

But what other circumstances meet the test expressed by Mr. Justice Story in the Perez case, which is the authoritative starting point of the law on this subject?

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the cirumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, Courts should be extremely careful with how they interfere with any of the chances of life, in favour of the prisoner.

Id. at 580.

In Gori v. United States, 367 U.S. 364 (1961), the Supreme Court, by a narow (5 to 4) majority, upheld a denial of a motion to dismiss on a plea of former jeopardy where the first trial was terminated by the trial judge's declaration of a mistrial sua sponte, without the defendant's action and express

consent. There it appeared that the trial judge had acted for the protection of the defendant. Although his conduct was characterized as "over-assiduous," "overzealous," and "too hasty," and his solicitude for the defendant as "overeager," the majority was "unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." Id. at 369.

Ten years later, the Court retreated somewhat from Gori's emphasis on the motivation of the trial judge to protect the defendant rather than to help the prosecution. In United States v. Jorn, 400 U.S. 470 (1971), the Court emphasized the defendant's "valued right to have his trial completed by a particular tribunal." Id. at 484.

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier for reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

Jorn, 400 U.S. at 485 (footnotes omitted).

The State relies on Cornish v. State, 272 Md. 312, 319 (1974), in which the Court of Appeals said:

> A retrial is permitted where the trial judge's action in declaring a mistrial is necessary to protect the interest of the defendant, United

> States v. Jorn, supra, 400 U.S. at 483, explaining and limiting the holding in Gori v. United States, supra; Whitfield v. Warden, 486 F.2d 1118, 1123 (4th Cir. 1973). Retrial is allowed where the mistrial was caused by the occurrence of an error which could not be cured during the remainder of the trial, and which would necessitate a reversal on appeal. State of Illinois v. Somerville, supra, [410 U.S. 458 (1973)].

That quotation begs the question. What is necessary to protect the interest of the defendant? Not, as the Supreme Court had initially assumed in Gori, what the trial judge may think is necessary, but what is actually necessary to protect the defendant. True, a great deal of deference must be given the trial judge's determination; he is on the scene and therefore in a much better position than the appellate court to form a conslusion as to what is necessary. But we must not lose sight of the fact that the defendant is also on the scene, and great deference

should be given his determination as to whether his own interests would be better served by aborting the trial or by submitting his fate to the jury that is already impanelled. We believe that, except in the most extraordinary circumstances, that decision should be left to the defendant, not the judge. As Judge Moylan, writing for this Court in Ball v.State, 57 Md.App. 338, 360 (1984), affirmed in part and reversed in part on other grounds sub, nom. Wright v. State, 307 Md. 552 (1986), expressed it:

> When a mistrial is even contemplated for the benefit of a defendant, the defendant has the final choice of whether he wishes a mistrial or not. The very value protected by this subvariety of double jeopardy law is the right of a defendant "in keeping together a tribunal, once it is impanelled, until a verdict hs been reached." West v. State, 52 Md.App. 624, 451 A.2d 1228 (1982). If a defendant chooses to stick it out to the sweet or bitter end, that is his choice. If the defendant desires a mistrial,

> he must manifest that desire by asking for it.

As to whether a mistrial is necessary in order to protect the interests of the defendant, therefore, we must let the defendant make that decision; it should not be made for him by the trial judge.

We turn now to the other mistrial/permissible retrial situation recognized by the Court of Appeals in Cornish: "Retrial is allowed where the mistrial was caused by the occurrence of an error which could not be cured during the remainder of the trial and which would necessitate a reversal [of a conviction] on appeal." That situation indeed would be an example of manifest necessity for a mistrial. There is nothing in the record of these proceedings, however, which places this case in that category. Somerville, which the Court of Appeals cited for that

proposition in Cornish, was a case in which the trial judge discovered, after the jury was sworn but before any evidence was presented, that the indictment was defective for failing to charge a criminal offense. Under Illinois law, that defect (1) could not be cured, (2) could be raised at any time, and (3) would necessitate reversal of any conviction.

In the case sub judice, the error was the admission of evidence, prejudicial to the defendant, that should have been excluded. Was the error curable by striking out the evidence and instructing the jury to disregard it because it was unreliable evidence? Both the Court of Appeals and this Court have frequently held (usually at the State's urging) that there is a presumption that a jury can and will follow curative instructions when they are given. See Johnson v. State, 303

Md. 487, 516 (1985); Wilhelm v. State, 272 Md. 404, 423-24 (1974); Veney v. State, 251 Md. 182, 197 (1968); Esterline v. State, 105 Md. 629, 635 (1907); Pinder v. State, 70 Md.App. 218, 234 (1987). In Worthen v. State, 42 Md.App. 20 (1979), there is reference to the fact that some of the finest legal minds have been the harshest critics of curative instructions, calling them "intrinsically ineffective" and referring to their penchant for purging prejudice as "unmitigated fiction." We expressly rejected such criticism, however. Id. at 34.

We are not holding that a curative instruction will always render harmless an error in the admission of evidence prejudicial to the accused. Certainly, it would be reversible error to admit into evidence an involuntary confession or, even worse, the confession of another

person which inculpates the defendant with the expectation that a curative instruction will negate the harm. See, Bruton v. United States, 391 U.S. 123 (1968). What we do hold is that the trial judge may not decide as a matter of law, over the defendant's objection or without his consent, that the harm is incurable. The defendant may believe that no substantial harm has been done; he may believe that a curative instruction would alleviate the harm; or he may believe that continuing the case before the jury already impanelled, if that jury is properly instructed, is a benefit that would outweigh any residual harm. If the defendant declines to move for a mistrial, choosing to continue the case before the impanelled jury, to which a curative instruction has been given, the error in admitting the evidence will not

necessitate a reversal; it will be deemed to be either cured or waived.

In summary, this case is one in which the trial judge, upon concluding that damaging statements which had been admitted into evidence should have been excluded, took it upon himself to declare a mistrial sua sponte in order to protect the rights of a defendant who did not seek or consent to that protection. There being nothing in the record indicating a manifest, i.e., palpable, evident, obvious, clear, plain, or patent, necessity for the trial judge to have aborted the trial, a retrial of appellant is barred by the Double Jeopardy Clause of the Fifth Amendment, which is made applicable to proceedings in State courts by the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). It was error to deny

appellant's motion to dismiss the indictment.

JUDGMENT REVERSED.

COSTS TO BE PAID BY CARROLL COUNTY.

State of Maryland	:	No. 2193 Criminal Trials
vs.	:	
	:	In the Circuit Court for Garrett County, Maryland
Gloria Crutchfield	:	

ORDER

Defendant's motion to dismiss is denied.

On March 1, 1988, the Court, sua sponte, declared a mistrial because of the introduction into evidence before a jury of four statements made by defendant, two of which the Court believed to have been inadmissible (and which the State, at the hearing on the motion, conceded were inadmissible) for reasons which were then fully explained to counsel. At that time the defendant neither consented nor objected to the declaration of the mistrial but accepted the benefit of the Court's determination without cavil.

"A retrial is permitted where the trial judge's action in declaring a

mistrial is necessary to protect the interest of the defendant. United States v. Jorn, 400 U.S. at 483 explaining and limiting the hodling in Gori v. United States; Whitfield v. Warden, 486 F.2d 1118, 1123 (4th Cir. 1973) . . .

"A retrial is allowed where the mistrial was caused by the occurrence of an error which could not be cured during the remainder of the trial, and which would necessitate a reversal on appeal, State of Illinois v. Somerville . . . ".

Cornish v. State, 272 Md. 312, 319 (1974). See also Neal v. State, 272 Md. 332 (1974).

The error was an innocent one on the part of the State; it created, however, the manifest necessity for the mistrial to avoid defeating the ends of public justice, United States v. Perez, 9 Whest. 579 (1824), because the trier of fact in this case, the jury, was exposed to inadmissible evidence which an instruction could not have cured. In the context of the State's presentation of the case, viz: that inconsistency in the four statements indicated prevarication on the part of the

defendant and mounted up to proof of premeditation, reversal on appeal appeared imminent were the case to continue to guilty verdict and sentence. It would have been a "travesty to proceed to conclusion" of the case. Any anguish to the defendant caused by the delay of the mistrial would have been exacerbated by the delay caused by successful appeal and retrial. Cornish, supra; Baker v. State, 15 Md.App. 73 (1972).

/s/ Fred A. Thayer
Fred A. Thayer
Chief Judge

Dated: 6/20/88

IN THE CIRCUIT COURT FOR
GARRETT COUNTY, MARYLAND

State of Maryland

vs. Criminal Trials
No. 2193

Cloria Crutchfield,

Defendant

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(RE: Mistrial)

Oakland, Maryland

March 1, 1988

BEFORE:

HONOARBLE FRED A THAYER, Chief Judge
(and a jury)

APPEARANCES:

For the State:

THOMAS E. HICKMAN, ESQ., and
ERIN BELL, ESQ.,

For the defendant:

BENJAMIN LIPSITZ, ESQ. and
JAY FRED COHEN, ESQ.

JEAN SELBY,
Official Court Reporter
Court House
Oakland, Maryland

P R O C E E D I N G S

THE COURT: Good morning.

BY COUNSEL: Good morning, your Honor.

THE COURT: Madam Forelady, ladies and gentlemen of the jury, first let me express my regret at the amount of time you have had to spend literally doing nothing except speculating as to why it is you weren't doing something. As I told you in some of the orientation, there aften came periods of time when I was in the process of conferring with counsel about a number of different things which weren't of specific interest to the jury and you would wonder why we weren't moving forward. You are going to learn very quickly why it is we didn't move forward.

Mr. Clerk, in this matter, 2193, I am going to declare a mistrial. I would indicate for the record initially that the defendant, Ms Crutchfield, has not sought

the mistrial and I am advised by counsel that she neither consents nor objects to the granting of the mistrial.

My reasons for granting the mistrial are as follows: There was a suppression hearing in this case in Carroll County prior to the removal to Garrett County. At that time there was a motion to suppress four separate statements made by Ms. Crutchfield to various police officers. The first was to Tpr. Wehland, which we heard about yesterday. The second was to Cpl. Marick. The third was likewise to Cpl. Marick, and the final one was to Tpr. Lewis. At pretrial conference with counsel, I indicated to them that I would accept the previous ruling of the Circuit Court for Carroll County in denying the motion to suppress and in finding each of the four statements admissible. Before Officer Marick

testified yesterday, counsel for Ms Crutchfield again renewed the motion to suppress, which I denied on the basis of the earlier ruling by Judge Gilmore. Thereafter you, the jury, and I and the assembled spectators heard Officer Marick testify about the two statements that were given to him, the first in the home of the defendant and the victim and the second one in his automobile parked outside the home. When he had concluded his testimony, I felt that it demonstrated that there was custodial interrogation of the defendant without prior Miranda advice as to Statements 2 and 3. At the conclusion of the evening's session after recess, I invited counsel into chambers and expressed my concern to them about my perception, and at that time reviewed for the first time the transcript of the suppression hearing. I likewise reviewed

carefully the decision of the Court of Special Appeals in the case In re: Shannon A., at 60 Md. App., 399, and Whitfield v. State of the Court of Appeals at 267 Md. 124. I concluded that the matter before Judge Gilmore constituted a close case. I was aware from hearing now Deputy Marick's testimony yesterday that Judge Gilmore had some bad information before him. After my review of the transcript, my review of the cases which set forth the test and the considerations that must be made to determine whether or not interrogation is custodial, and if so, imposing the necessity of giving the Miranda advice, I continued in my belief that the examination or the interrogation of the defendant by Cpl. Marick was custodial, and because it was not accompanied with Miranda advice, rendered those two statements inadmissible. I explained my

reasons this morning in considerable detail to counsel for both sides. I asked for their advice. We concluded that the only means of permitting this to begin again afresh was to grant the mistrial. I am satisfied that the State proceeded yesterday in good faith. I am satisfied that it offered the two statements by means of the testimony of Deputy Marick in good faith, relying certainly on the ruling provided by Judge Gilmore, and relying upon what the State believed to be the effect of the holding in In re: Shannon A. I believe that was a mistake. Perhaps it was not. In any event, I believe it now would be a travesty to proceed to a conclusion of this case, and therefore, I've granted the mistrial.

* * * * *

IN THE CIRCUIT COURT
FOR GARRETT COUNTY, MARYLAND

State of Maryland

vs. Criminal Trials
No. 2193

Gloria Crutchfield

Defendant
_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(Excerpt: Motions and Testimony of
Tpr. Douglas Wehland
TFC Audie H. Murphy and
Cpl. Joseph Marick)

Oakland, Maryland
February 29, 1988

BEFORE:

HONORABLE FRED A. THAYER, Chief Judge
(and a jury)

APPEARANCES:

For the State:

THOMAS E. HICKMAN, ESQ. and
ERIN BELL, ESQ.

For the defendant:

BENJAMIN LIPSITZ, ESQ. and
JAY FRED COHEN, ESQ.

JEAN SELBY,
Official Court Reporter
Court House
Oakland, Maryland

P R O C E E D I N G S

* * * * *

MR. LIPSITZ: May we approach the bench a moment, your Honor?

THE COURT: Certainly.

(Counsel and the defendant approached the bench and the following ensued:)

MR. LIPSITZ: Who's your next witness, Tom, if I may inquire so that I'll know whether it's time we--

MR. HICKMAN: Tpr. Murphy.

MR. LIPSITZ: Okay. May I now renew my motion to suppress, your Honor?

THE COURT: No, we discussed that at pretrial and I told you then that I intend to rely on Judge Gilmore's ruling.

MR. LIPSITZ: I know, but I may renew it and you simply deny it?

THE COURT: Yes, certainly.

MR. LIPSITZ: Yes, I thought --- I'm just asking to renew it because now he's coming up with some statement witnesses and--

THE COURT: You may do so.

MR. LIPSITZ: -- yeah, I'll just renew it and you deny it.

THE COURT: Yes.

MR. LIPSITZ: Okay, fine. Thank you.

* * * * *